LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 10 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1007

COE A. BOARDMAN and MARTHA E., his wife, and FRANK J. SMITH and THERESE E., his wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

JOHN L. SULLIVAN,
804 Ring Building,
1200—18th Street, N. W.,
Washington, D. C.,
FRANCIS W. SULLIVAN,
2304 The Fidelity Building,
Philadelphia, Pennsylvania,
Attorneys for Petitioners.

Of Counsel:
SYDNEY C. ORLOFSKY,
STEPHEN A. COZEN.

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Question Presented 2

Statement of the Case 3

Reasons Relied Upon for Allowance of the Writ 7

A. The Test Applied By The Court Of Claims With Regard To The Time Of "Taking" Was Erroneous And In Direct Conflict With Prior Decisions Of Such Court And Of This Court 7

B. The Decision Below Improperly Deprives Petitioners Of A Constitutional Right And Is Based Upon The Improper Application Of A Federal Statute 21

Conclusion 22

Appendix 24

Opinion Of The United States Court Of Claims 24

Order Sur Motion For Rehearing Of The United States Court Of Claims 34

TABLE OF CITATIONS

CASES:

Acme Process Equipment Co. v. United States, 347 F. 2d 538 (Ct. Cl. 1965) 15

PAGE

Avery v. United States, 330 F. 2d 640 (Ct. Cl. 1964) . 14, 15

Bacon v. United States, 295 F. 2d 936 (Ct. Cl. 1961) . . 8, 13, 16, 17, 21

Ball v. Paramount Pictures, Inc., 169 F. 2d 317 (3rd Cir. 1948) 14, 19

Batten v. United States, 306 F. 2d 580 (10th Cir. 1962) 8

Bedford v. United States, 192 U. S. 217 (1904) 8

Boardman v. United States, 376 F. 2d 895 (Ct. Cl. 1967). 2, 6, 7, 8, 14, 16, 17

Davis v. United States, 295 F. 2d 931 (1961) . . 8, 14, 15, 21

Friedman v. United States, 310 F. 2d 381 (Ct. Cl. 1962) 17

Gordon v. United States, 140 F. Supp. 263 (Ct. Cl. 1956) 17, 21

Griggs v. Allegheny County, 369 U. S. 84 (1962) 7

Jensen v. United States, 305 F. 2d 444 (Ct. Cl. 1962) 8, 15, 16, 17, 21

Klein v. United States, 152 Ct. Cl. 221 (1961) . . . 8, 13, 14, 15, 16, 17, 21

Madigan v. United States, 142 Ct. Cl. 641 (1958) 17

Todd v. United States, 292 F. 2d 841 (Ct. Cl. 1961) . . 17

United States v. 3276.21 Acres of Land, 222 F. Supp. 887 (S. D. Cal. 1963) 8, 9, 16

United States v. Causby, 328 U. S. 256 (1946) 7, 21

United States v. Dickinson, 331 U. S. 745 (1947) . . 7, 8, 10, 11, 12, 15, 16, 21, 22

PAGE

United States v. Martin, 267 F. 2d 764 (10th Cir. 1959) 11

STATUTES:

28 U. S. C. §1255 (1) 2

28 U. S. C. §2101 (c) 2

28 U. S. C. §2501 ..... 2, 3, 6, 7, 12, 13, 16, 17, 21, 22

Air Commerce Act of 1926, U. S. C. §171, as amended by Civil Aeronautics Act of 1938, 49 U. S. C. §401 7

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1967.

No.

COE A. BOARDMAN and MARTHA E., his wife and
FRANK J. SMITH and THERESE E., his wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

The Petitioners are individuals, husbands and wives, hereinafter referred to as "Petitioners".

Petitioners respectfully pray that this Honorable Court may grant a writ of certiorari to the United States Court of Claims to review a judgment of that Court entered May 12, 1967, in which rehearing was denied October 13, 1967.

OPINIONS BELOW.

The Opinion of the Court of Claims dated May 12, 1967 is reported in 376 F. 2d 895 (Ct. Cl. 1967). It is fully set forth in an appendix to this petition. The opinion of the Trial Commissioner is unreported.

JURISDICTION.

(a) The judgment of the Court of Claims was entered on May 12, 1967.

(b) Pursuant to Rule 68 of the Court of Claims Petitioners filed a Motion for Rehearing on June 9, 1967. Such Motion was denied by the Court by way of Order dated October 13, 1967.

(c) Jurisdiction to consider this petition is conferred upon this Court by 28 U. S. C. §1255 (1), the petition being timely filed under the provisions of 28 U. S. C. §2101 (c).

QUESTION PRESENTED.

Was the Petitioners' cause of action for compensation for the taking of an avigation easement over their property by Respondent barred by the Statute of Limitations set forth in 28 U. S. C. §2501?

STATEMENT OF THE CASE.

The Petitioners, FRANK J. SMITH and COE A. BOARDMAN, prior to the filing of the petition in this matter had been engaged in the residential building development business for a number of years (N. T. 13).

Petitioners commenced suit against the Respondent on December 5, 1963 by filing a petition with the United States Court of Claims seeking damages for a taking of an avigation easement over the Petitioners' property located in Horsham Township without just compensation in violation of the Fifth Amendment of the United States Constitution.

The Respondent filed an answer to Petitioners' petition denying that a taking had occurred and averring that if a taking did occur it was barred by the six year Statute of Limitations provisions of 28 U. S. C. §2501.

The case was tried before the Honorable C. Murray Bernhardt, Commissioner of the United States Court of Claims on October 13th and 14th, 1965, at the United States Naval Air Station, Willow Grove, Pennsylvania.

At trial the Petitioners produced evidence that they had, for many years, been engaged in the construction of residential home developments in southeastern Pennsylvania and surrounding states (N. T. 13, 20, 21).

On June 13, 1955 the Petitioners purchased a tract of land consisting of 122.55 acres in Horsham Township, Montgomery County, Pennsylvania, which site was to be subdivided and used for residential home development. The tract of land is bounded by Keith Valley Road and Park Road and lies immediately north of the Willow Grove Naval Air Station (N. T. 13-14).

At the time of the acquisition Petitioner, Frank J. Smith and his agent, Paul Franz, were informed that the Air

Station was to be closed, and they had no knowledge that the Air Station was to be expanded (N. T. 18-19, 37-38).

It was established that Melvin Stackhouse, a lumberman, commencing in November of 1956 and continuing until August of 1957, had cut down the large trees on the subject property which enabled the Petitioners to prepare a preliminary subdivision plan for the development (N. T. 119-122).

From August, 1957 until 1960, the Petitioners did not actively pursue their development plans since they were engaged in other construction work in the State of New Jersey (N. T. 23-24). In 1958 the Respondent changed the flight pattern of its aircraft so as to bring such aircraft directly across Petitioners' property for the first time (N. T. 375, 379, 426).

Mr. Franz, in 1960, as real estate agent for the plaintiffs, was contacted by Donald Carlson who made an offer to purchase one of the lots in the proposed subdivision plan, and subsequently an agreement of sale with Mr. Carlson was concluded (N. T. 81).

As a result of this activity the Petitioners decided to proceed to develop the subject property, and engaged Charles E. Shoemaker, a Professional Engineer, to prepare a subdivision plan for the subject property for submission to the Horsham Township Planning Commission for approval (N. T. 27, 28, 103).

Commencing on August 3, 1960 and continuing until February 10, 1961, Mr. William Hower, of Charles Shoemaker's office, met with the said Planning Commission to resolve all of the technical engineering questions involved in the subdivision plan (N. T. 102-111).

During this same period of time Mr. Franz met with the Planning Commission seeking approval of the subdivision plan and it was at this time that the Petitioners learned that the Planning Commission was reluctant to approve a resi-

dential development located in close proximity to the Willow Grove Air Station for fear that the aircraft operating out of the base might possibly crash resulting in a major catastrophe (N. T. 83, 85).

The Petitioners, notwithstanding this fact, pursued adoption of their subdivision plan because in view of their experience it was clear that the subject area was otherwise physically excellent for development.

However, the Planning Commission would not approve the subdivision plan even though it fell clearly within the proper zoning classification, and met all of the Commission's engineering specifications (N. T. 85, 159).

Petitioner Smith then advised Mr. Franz at the time of the crash of the jet aircraft into the Bargain City Department Store at Horsham, Pennsylvania, on August 27, 1961 to abandon the subdivision plan since the action of the Planning Commission in rejecting the plan because of the risk involved with the jet aircraft rendered the property valueless for residential purposes (N. T. 86).

Benjamin Park, a member of the Planning Commission, stated unequivocally that the Commission rejected plaintiff's subdivision plan solely because of the risk involved to residents around the Air Station (N. T. 166).

As further evidence of the fact that up until 1961 the property was valuable for residential development, Felix Clauss, an experienced builder, testified that he acquired the tract of land immediately adjacent to the Petitioners' property for residential development, but abandoned said plans about the time that the air crash occurred in August of 1961 (N. T. 130, 140).

Harry Haeberle, an experienced real estate appraiser, testified on behalf of Petitioners that in his opinion the highest and best use of the subject property was for a residential community of homes ranging in price from $22,000. to $22,500. Mr. Haeberle further stated that prior to the taking

the value of the property was $437,400., and that immediately after the taking the property had been reduced in value to $175,400 (N. T. 188, 191, 193).

The Respondent introduced a number of witnesses whose testimony in many instances was cumulative, but in essence disclosed that jet aircraft started operating over the subject property in July, 1955, and that such aircraft created noise in taking off and landing over the subject property.

After the trial of the case before the Commissioner both parties filed Requested Findings of Fact and Briefs on the Law.

On July 13, 1966 the Commissioner filed his Report to the Court, setting forth findings of fact and recommended conclusions of law pursuant to Rule 57 (a).

Thereafter, Petitioners duly filed exceptions to the report of the Commissioner, which exceptions were argued before the Court en banc.

On May 12, 1967 the Court of Claims adopted the opinion, findings and recommendations of the Commissioner, with modifications, and entered judgment dismissing Petitioners' petition. *Coe A. Boardman, et al. v. United States,* 376 F. 2d 895 (Ct. Cl. 1967). The Court's holding was based upon its determination that Petitioners' Constitutional right to just compensation for the conceded "taking" of their property by Respondent was barred by the running of the Statute of Limitations set forth in 28 U. S. C. §2501. 379 F. 2d at 896-897, 900.

Petitioners, within the requisite time allowed by the Rules of Court, filed a Motion For Rehearing, but such Motion was denied by the Court en banc.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

A. The Test Applied By The Court Of Claims With Regard To The Time Of "Taking" Was Erroneous And In Direct Conflict With Prior Decisions Of Such Court And Of This Court.

It has been conceded by the Respondent and the Court below that a compensable "taking" occurred by reason of the flight of government aircraft over Petitioners' superadjacent airspace and below the lower limits of navigable airspace. *Coe A. Boardman, et al. v. United States,* 376 F. 2d 895 (Ct. Cl. 1967); Air Commerce Act of 1926, 49 U. S. C. §171, as amended by Civil Aeronautics Act of 1928, 49 U. S. C. §401.

Such a constitutional "taking" of an avigation easement over the Petitioners' subject property would entitle them to just compensation if their action has been brought within the period prescribed by 28 U. S. C. §2501. *United States v. Causby,* 328 U. S. 256 (1946); *Griggs v. Allegheny County,* 369 U. S. 84 (1962); *United States v. Dickinson,* 331 U. S. 745 (1947).

28 U. S. C. §2501 provides, inter alia as follows:

> "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim accrues."

In holding that Petitioners' claim was barred by the foregoing Statute of Limitations the Court below stated:

> "We cannot say with any confidence at what precise point after the first arrival of jets at Willow Grove in July 1955 they reached the level of substantial inter-

ference, but it is clear that it was reached at least by the summer of 1956 when conditions prompted the convincing complaint by the proprietor of the Silver Arrow Day Camp, referred to above." 376 F. 2d at 900.

The government's contention, presumably accepted by the Court below, is that the date of taking could be any particular day between the time of the first arrival of jets at Willow Grove in July, 1955 and the summer of 1956 when enough jets flew enough times over the subject property at low enough altitudes so as to disturb the enjoyment of a user of that property. This is clearly not the test envisioned by the Supreme Court in the case of *United States v. Dickinson,* 331 U. S. 745 (1947), nor is it the test enunciated by the Court of Claims itself in *Klein v. United States,* 152 Ct. Cl. 221 (1961); *Davis v. United States,* 295 F. 2d 931 (1961), *Bacon v. United States,* 295 F. 2d 936 (Ct. Cl. 1961); and *Jensen v. United States,* 305 F. 2d 444 (Ct. Cl. 1962).

If the government's theory were adopted, it could escape liability in almost every case of alleged inverse condemnation. The government could assert, in actions brought by landowners immediately after the advent of jet aircraft and flights over their property, that no "taking" had occurred; merely a trespass. On the other hand, if the landowner waits until conditions become intolerable or obnoxious and only then institutes suit, the government could then argue that the same *initial* overflights were of such character as to constitute a "taking" as *opposed to a mere trespass.* Such a situation was never intended nor can it be permitted to exist.

See: *Batten v. United States,* 306 F. 2d 580 (10th Cir. 1962); *Bedford v. United States,* 192 U. S. 217 (1904).

In *United States v. 3276.21 Acres of Land,* 222 F. Supp. 887 (S. D. Cal. 1963), the Court commented as follows:

"In our case there was not a complete taking bit by bit or foot by foot of land as the trespasses of the United States continued. Undoubtedly, the first trespasses by single prop planes were so insignificant as to cause the land owner no concern whatsoever. Gradually the flights increased. Eventually, in August of 1955, the greatly accelerated number of flights by jets so interfered with the land, and became so oppressive that a *taking* was instituted or started. We term it an "incipient taking". Thus in our case, we had trespasses increasing bit by bit until the time the taking occurred. In the *Dickinson* case each foot of land was completely taken as the water rose and covered it.

We cannot escape the teaching of the cases that the government must pay in a condemnation case for property taken, but not for property damaged. Each trespass might be called damage to the property, but as set forth heretofore, the trespass did not become so extensive as to constitute an incipient taking until August of 1955. If each flight of a plane across the land owner's property below the public domain, and constituting merely a trespass gave rise to a cause of action, the situation that would result would be intolerable. The claims would flood the courts, the alleged damage would be in each instance almost impossible to ascertain."

* * *

"It would seem that the break line as to where compensable damage exists in either a case involving condemnation or inverse condemnation would be that time when the trespass flights became so intolerable, so oppressive and created such a substantial interference with the use of the property that they ceased to be a mere trespass and constituted a taking or incipient taking." 222 F. Supp. at 891. (Emphasis supplied.)

The touchstone of the Court's decision below should have been Justice Frankfurter's opinion in *Dickinson*, supra. Because his language is clear and unambiguous, to paraphrase it might be to dilute it. We, therefore, quote the same at length:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. *The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old and new niceties regarding 'cause of action'—when they are born, whether they proliferate and when they die.* We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the government would not unnaturally postpone bringing a suit against the government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.

When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. All that we are here holding is that when the government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or premature litigation to ascertain the just compensation for what is really 'taken'." 331 U. S. at 748-749. (Emphasis supplied.) See also: *United States v. Martin*, 267 F. 2d 764 (10th Cir. 1959).

In *Dickinson*, supra, the government had built a dam and notified adjoining landowners, in 1936, that it intended to elevate the river level. The dam was impounded with water in October, 1936, but the river level was not raised until September, 1938. Plaintiffs instituted suit in 1943 and the government defended on the ground that plaintiffs' property had been continuously flooded since October, 1936, although it was not completely inundated until after September, 1938. Thus, the government argued, plaintiffs' action was barred by the applicable six year Statute of Limitations. The Supreme Court rejected the government's argument and affirmed judgments for the plaintiffs rendered by the trial court.

Justice Frankfurter, speaking for the Court, set forth the foregoing basic principles of law and equity that must govern every trier of fact who is presented with the question of the application of the statute of limitations in an inverse condemnation case.

He further commented as follows:

"The government could, of course, have taken appropriate proceedings to condemn as early as it chose both land and flowage easement. By such proceedings, it could have fixed the time when the property was 'taken'. The government chose not to do so. It left the

> taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could not longer be in controversy." 331 U. S. at 747-748.

Accordingly, it must be recognized that the statute of limitations is not a club to be wielded by the government to punish one whose property it has taken and upon whom is cast the onerous task of subjectively determining at what point in time his inchoate claim for such wrongdoing has ripened into a sustainable cause of action. Rather, the limitation language of 28 U. S. C. §2501 was intended, and should be applied by the Court, as a bar to those actions based upon an allegation of inverse condemnation in which the quantum and character of interference from overflights was so severe at a particular time or for a particular period, more than six years prior to the institution of the action, as to make it clear to the injured party (and it is so proven by the government) that the subject property has been rendered valueless for the purpose for which it was intended to be used or had been used. Only if the statute of limitations is so applied is the Court aided by its application and is the injured party not deprived of a constitutional right which has already vested.

The test laid down in *Dickinson*, supra, represents a fine balance between objective and subjective considerations and elements, but is clear in intent: where the government chooses not to condemn property but, rather, to leave the "taking" to a series of physical events, the owner of the property, upon whom is cast the "onus of determining the decisive moment in the process of acquisition . . . when the fact of taking" can no longer be in controversy, ought not be penalized by a rigid application of the Statute of Limitations. *United States v. Dickinson*, supra at 747-748.

This well balanced test was initially applied by the Court of Claims in *Bacon v. United States,* 295 F. 2d 936 (Ct. Cl. 1961) and *Klein v. United States,* 152 Ct. Cl. 221 (1961).

In *Bacon,* supra, overflights of B-25 bombers began during World War II and jet aircraft were operational in 1948. Both flew below the lower limits of navigable airspace. The Court queried: when were the overflights so obnoxious as to become intolerable to plaintiffs? Although there was *no evidence of any significant change in flight pattern* the Court held that a "taking" did not occur until 1954 when louder jets were introduced, one of which crashed into the subject property in 1955.

In *Klein,* supra, plaintiffs continuously protested overflights which began in 1947. Originally, the Court of Claims found that plaintiff's action was barred by the limitation provision of 28 U. S. C. §2501, but upon rehearing determined that it had not correctly applied the *Dickinson* test and reversed, holding that:

> "Plaintiffs had been uneasy about the flight of the planes over their property and suffered considerable inconvenience from the noise and vibration, but until about the first of September 1954 they had not found the conditions intolerable."

One of the essential, compelling facts upon which the Court there relied was a change in flight pattern which brought the planes directly over the subject property. The change, the Court stated, was not one which plaintiffs had reason to anticipate. Plaintiffs' cause of action, therefore, had not fully accrued and did not fully accrue until such conditions had come to pass or the extent of the use and the consequent interference with such use and enjoyment of the property was fully known or ascertainable.

Applying the tests set forth in *Bacon* and *Klein* it is submitted that Petitioners' action herein was timely.

Initially, there was increased flight activity after 1957 which was not to be anticipated (witness the base commander's letter to Mr. Barmat, Exhibit D-20, N. T. 322).

Secondly, the introduction of F-1 jets in 1959 meant a significant change in the noise factor. 376 F. 2d at 897.

Thirdly, the very important change in flight pattern from a left to right hand pattern which for the very first time brought aircraft directly over the middle of Petitioners' property (N. T. 375, 379, 426). *This change occurred in 1958* because of the recognition of a safety factor in the congested residential areas to the east of Petitioners' property.

Fourthly, the introduction of night flying in 1960 (N. T. 385, 393).

Finally, the fatal crash which took place on August 27, 1961 adjacent to Petitioners' property. 376 F. 2d at 898.

Thus, in 1958 a hitherto unexpected and unanticipated change occurred which for the first time subjected Petitioners' entire property to overflights below the lower limits of navigable airspace.

Under the theory of *Klein v. United States,* supra, *Davis v. United States,* supra, and *Avery v. United States,* 330 F. 2d 640 (Ct. Cl. 1964) it is submitted that the foregoing unanticipated acts by the government cumulatively created a surcharge upon or "taking" of Petitioners' property.

An even-handed application of the tests laid down in *Dickinson,* supra, and followed in *Klein* and *Davis,* supra, requires at the very least some recognition of the fact that the flight pattern was changed and that such change was not anticipated by Petitioners. Certainly, the Court below was not required to reach the same conclusions or draw the same inferences as the Trial Commissioner, and could have analyzed and disposed of such facts in accordance with their judicial power to do so. *Ball v. Paramount Pictures,* 169 F. 2d 317 (3rd Cir. 1948).

But, neither these facts nor the conclusions contended for by Petitioners—facts which were so important in *Klein* and conclusions which were considered critical in *Davis* and *Avery,* supra—were even considered by the Court below.

Such a failure to apply the same standards to the instant case that had been previously applied to similar claims may not rise to the status of a violation of Petitioners' right to equal protection of the law or due process, but does evidence a disposition on the part of the Court below to accept without question or proper review the facts, conclusions and tests of the Trial Commissioner. Cf., *Acme Process Equipment Co. v. United States,* 347 F. 2d 538 (Ct. Cl. 1965), Footnote 2 at p. 542.

As Judge Whitaker aptly pointed out in his concurring opinion in *Davis v. United States,* 295 F. 2d 931 (Ct. Cl. 1961), the teaching of the *Dickinson* case compels the conclusion that plaintiffs are entitled to wait until they can ascertain the full extent to which defendant's flights would interfere with the use and enjoyment of their property and only then sue for the entire reduction in value at one time. A continuous course of conduct requires only one action. *Davis v. United States,* supra at 935.

The decision of this Court in *Jensen v. United States,* 305 F. 2d 444 (Ct. Cl. 1962), seems to have sought to clarify some of the objective standards left open in *Dickinson.* But, while not forsaking the subjective reactions of the Petitioners, even a strict application of the objective standards enunciated in *Jensen* support Petitioners' contention that the instant action occurred no earlier than December 5, 1957.

What was said by the Court of Claims in *Jensen,* supra, is pertinent here:

> "There is, unfortunately, no simple litmus that for discovering in all cases when an avigation easement is first taken by over flights. Some annoyance must be

> borne without compensation (Citing Cases). The point when that state is passed depends on a particularized judgment evaluating such factors as the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life. The Government's argument that the taking in this case occurred before February 1952 (i.e. prior to six years before the filing of the petitions) fails because it overstresses some of these elements and neglects others which are critical." 305 F. 2d at 447.

The Government has in this case also overstressed some elements and neglected others which are critical. But, what is most disturbing is that the Court below should have fallen prey to such an obvious bootstrap tactic.

The test propounded by the respondent and obviously accepted by the Court below—to wit: during what point of time did enough jets fly enough times over the subject property at low enough altitudes so as to disturb a user of such property to a greater extent than they previously had done (376 F. 2d at 899)—all but obliterates the underlying intent and purpose of 28 U. S. C. §2501 as analyzed and discussed by this Court in *Dickinson,* supra. It completely discards the subjective considerations deemed so necessary to obtain a just result in *Bacon* and *Klein,* supra. It conflicts directly with decisions rendered, based upon the well established rationale of *Dickinson,* by lower courts of concurrent jurisdiction. See: *United States v. 3276.21 Acres of Land,* 222 F. Supp. 887 (S. D. Cal. 1963). It permits the use of the objective standards set forth in *Jensen,* supra, to be used as tools for the rationalization of facts and the justification for improper conclusions based upon such

facts. It elevates to an unwarranted and absurd position the procedural rigidities sought to be avoided by Justice Frankfurter and would destroy Constitutional rights in Fifth Amendment claims which are fresh and can be proven with sufficient accuracy. It distorts the entire purpose of 28 U. S. C. §2501 which was to aid the Courts by bringing before them fresh claims supported by recent factual circumstances. *Friedman v. United States,* 310 F. 2d 381, 401 (Ct. Cl. 1962); *Gordon v. United States,* 140 F. Supp. 263, 265 (Ct. Cl. 1956).

Moreover, throughout the thread of the opinion below is a clear indication that the burden of persuasion with respect to the time of the accrual of the Petitioners' cause of action and the facts necessary to such determination was improperly cast upon the Petitioners.

The burden of pleading and "persuasively" proving that Petitioners' conceded cause of action was barred by the limitation language of 28 U. S. C. §2501 should have been upon the Respondent, who affirmatively relied upon such statute. *Todd v. United States,* 292 F. 2d 841 (Ct. Cl. 1961); *Madigan v. United States,* 142 Ct. Cl. 641 (1958).

The fact that Respondent failed to present evidence sufficient to satisfy its burden of persuasion with respect to the time at which the Petitioners' claim accrued is manifested by the Court's admission that it cannot say with any confidence when the "taking" occurred. 376 F. 2d at 900.

Furthermore, in its attempt to rationalize the facts in order to fit them to the classical test enunciated in *Dickinson* and fashioned with preciseness and justice in *Bacon, Klein* and *Jensen* the Court below has arrived at a hybrid test which provides neither the Constitutional fairness of Justice Frankfurter and the essential subjectivity of *Bacon* and *Klein,* nor the valid and helpful objectivity of *Jensen,* supra.

The major areas of reliance upon facts by the Trial Com-

missioner and the Court are indicative of the validity of the foregoing analysis.

The testimony of Mr. Barmat, proprietor of the day camp adjacent to Petitioners' property, whose "convincing complaint" admittedly influenced the Court's decision, rendered such aforesaid complaint meaningless. The "complaint" was not made until after the summer of 1956, after Barmat had entered into a five year lease for the premises on which he remained until 1961 when the lease ran out and he did not renew it because he "just didn't want to remain there" (N. T. 320, 326).

The testimony of Mr. Barmat did not support Respondent's contention that by the summer of 1956 conditions had become intolerable and that the level of substantial interference had been reached. He admitted that in 1956 and 1957 there "wasn't much air traffic" during weekdays (N. T. 338); that subsequent to 1957 there was an increase in the number and intensity of the overflights (N. T. 333); that they became worse toward 1961 (N. T. 333, 337); and that the transition to jets at the air base was only "largely completed" in the summer of 1956 (N. T. 323).

If the conditions of which he complained existed in the summer of 1956, why did Mr. Barmat undertake a *five year* lease of the property in 1957?

If the transition to jets had not been completed in the summer of 1956, if there "wasn't much air traffic" then, and there was an increase in the number and intensity of overflights after 1957, how can the summer of 1956 possibly be the date of "taking"?

The Commissioner, and the Court below, have stated that they cannot "say with any confidence" when the conceded taking occurred. Was it not the duty of the Respondent to supply such confidence by the presentation of persuasive evidence?

Moreover, the Court below could have accepted the bare

findings of fact made by the Commissioner without also accepting and adopting his inferences and conclusions. See: *Ball v. Paramount Pictures, et al.*, 169 F. 2d 317 (3rd Cir. 1948). In accepting such conclusions the Court was required so to rationalize the facts as to distort the test which should have been applied in order to reach a just conclusion.

That this is so is amply demonstrated by reference to facts relied upon by the Court below as part of the basis for its decision.

With respect to the decision of the F.H.A. not to offer financing for residential development, the Commissioner himself remarked that this was consistent with the previously announced policy of the F.H.A. in 1954 to systematically reject applications for any property proximate to an airport, from which, at any time in the future, overflights might emanate (N. T. 270-273). The fact that it was because of this previously written policy, and *not* because of any demonstrably dangerous condition at the subject air base, that prompted the F.H.A. decision was confirmed categorically by *Respondent's witness* Gabler (N. T. 270-273).

In addition, the statement by the Court below that there was no cause and effect relationship between the crash in 1961 and the rejection of plaintiffs' sub-division plan by the township Planning Commission is refuted by the testimony of *Respondent's witness* Park (N. T. 163-166).

Mr. Park, in answer to direct questions put to him by the Commissioner stated without contradiction:

(1) That the Planning Commission did not formulate a definite policy with regard to sub-division in the area in question until after the 1961 crash (N. T. 164);

(2) That they were prompted to formulate such policy *solely* by reason of the crash (N. T. 166) when they real-

ized that "the statement 'It can't happen here' did happen once"; and

(3) That it was more of a safety factor than a noise factor which prompted their decision to forbid residential development in the area (N. T. 164).

Uncontradicted evidence clearly demonstrated that from 1960 until the rejection of their plan in 1962 the plaintiffs actively pursued their sub-division application (N. T. 103, 104, 107, 108, 109, 159, 85).

It was, as Mr. Park admitted, the *fact of failure* and not the mere fear of failure which prompted the Commissioner's decision. Out of the 17 crashes referred to by the Commissioner, 15 occurred *on the base itself*, and the other two nowhere near plaintiffs' property. See: Exhibit D-29.

It is inconceivable that the Commissioner, and Court below, could justifiably conclude that the risk of crashes *on the subject property* was appreciable before the change in the flight pattern in 1958 (N. T. 426) and the crash in 1961 or that there was no causal relationship between the aforesaid crash and the act of the Planning Commission. Such a conclusion flies in the face of the evidence.

The opinion of the Court below concedes that the *risk* of crashes alone does not trigger a "taking" although it may constitute a trespass. But, the *fact* of a crash, in light of increased air traffic, a significant change in flight pattern which for the first time in 1958 brought government aircraft directly over the subject property, and the introduction of night flying, do present a series of events the cumulative effect of which constituted a "taking" no earlier than the beginning of 1958.

Clearly the evidence introduced by the government, upon whom lay the affirmative burden of proving the precise date of "taking", was insufficient to support the conclusion reached by the Court below.

Clearly the test applied by the Court was distorted by its attempt to fit the unsupported theories presented by Respondent into the concepts defined and fashioned by *Dickinson, Bacon, Klein, Davis* and *Jensen,* supra.

The Court's determination that Petitioners' cause of action was time barred ignores the precepts of the cited authorities, ascribes grandiose importance and significance to a federal statute designed merely to aid the Courts and not to punish litigants or deprive them of Constitutionally protected rights, and conflicts directly with the state of established law. If permitted to stand it would constitute a great departure from the principles so carefully considered and set forth heretofore.

B. The Decision Below Improperly Deprives Petitioners Of A Constitutional Right And Is Based Upon The Improper Application Of A Federal Statute.

This Court recognized in *United States v. Causby,* supra, the Constitutional right of a property owner to just compensation for the taking of an avigation easement over such property by the federal government. 328 U. S. at 266-267.

The federal statute here under consideration, 28 U. S. C. §2501, did not create such right, but merely added the "procedural niceties" of due process which were not contained in the Fifth Amendment of the Constitution. *United States v. Dickinson,* supra at 748. The Act is a procedural device to prevent the presentation of stale claims, "where the facts were not clear by reason of the passage of time". *Gordon v. United States,* supra at 265. In this respect, it is a perfectly proper subject of affirmative proof by the defendant in an appropriate case.

In this case Respondent left the "taking" to physical events thereby casting upon Petitioners the burden of de-

termining the precise moment at which their rights accrued. See: *Dickinson*, supra.

The Court below has now seen fit to absolve the Respondent from liability by reason of its conceded unconstitutional taking of Petitioners' property by not only failing to apply the tests sanctioned by this Court and previously applied in other cases by the Court below, but by, moreover, failing to require the Respondent to bear the burden of persuasion with respect to the time of the accrual of the action.

To permit such a result to stand would not only work a manifest injustice to the Petitioners, but would cast an improper and unwarranted burden upon future claimants. It is, therefore, important that the inter-relationship between 28 U. S. C. §2501 and Fifth Amendment rights be clarified, and that a definitive statement respecting the burden of proof of the government in cases in which an unconstitutional "taking" has been conceded be made.

CONCLUSION.

The test applied by the Court below in determining the time at which a concededly unconstitutional "taking" of Petitioners' property occurred was erroneous and in direct conflict with prior decisions of this Court, courts of concurrent jurisdiction, and of such Court itself.

The Court below failed to consider the question of whether or not an additional surcharge or "taking", for which an action was not barred, had occurred and in so doing abdicated its right and duty to draw proper legal conclusions from the facts found by the Trial Commissioner.

The decision below is based upon the imposition of an improper burden upon Petitioners and an improper application of a federal statute. Since such statute must be ap-

plied to claims dealing with Fifth Amendment rights it is imperative that a definitive statement respecting the purpose of the Act and its relationship to Constitutional rights be made.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN L. SULLIVAN,
FRANCIS W. SULLIVAN,
Attorneys for Petitioners.

Of Counsel:
SYDNEY C. ORLOFSKY,
STEPHEN A. COZEN.

APPENDIX.

IN THE
UNITED STATES COURT OF CLAIMS

No. 346-63.

(Decided May 12, 1967)

COE A. BOARDMAN AND MARTHA E., HIS WIFE, AND FRANK J. SMITH AND THERESE E., HIS WIFE

v.

THE UNITED STATES.

Before: COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

OPINION.

PER CURIAM: This case was referred to Trial Commissioner C. Murray Bernhardt with directions to make findings of fact and recommendation for conclusions of law. The commissioner has done so in a report and opinion filed on July 13, 1966. Exceptions to the commissioner's findings

and recommendation for conclusion of law were filed by plaintiffs and the case was submitted to the court on the briefs of the parties and oral argument of counsel. Since the court is in agreement with the opinion, findings and recommendation of the commissioner, with modifications, it hereby adopts the same, as modified, as the basis for its judgment in this case, as hereinafter set forth. Plaintiffs are therefore, not entitled to recover and their petition is dismissed.

Commissioner Bernhardt's opinion,* as modified by the Court, is as follows:

Ever since a measure of governmental liability was found by the Supreme Court in the landmark case of *United States v. Causby*, 328 U. S. 256 (1946) for the taking of private property rights by regular aircraft overflights,—a wrong theretofore esteemed by many to be a noncompensable trespass,—lower courts coping with the spate of suits inspired by the *Causby* example have encountered recurring difficulty in fixing the accrual date of each cause of action. That is the problem here, and the petition stumbles on our six-year statute of limitations. 28 U. S. C. §2501. The plaintiffs' theory of placing the taking date to coincide with a nearby airplane crash in 1961 which dramatized, but did not create, the risk to residential developments neighboring the airport, is not orthodox; nor does it relieve from the bar of the statute the petition filed here in 1963 to redress flight nuisances commencing in 1955 and fluctuating only mildly in quantity and quality in succeeding years. In effect, the plaintiffs are necessarily saying that in themselves the overflights from 1955 onward did not deprive their property of residential value, but only when in combination with the risk factor which (according to

* The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 57(a).

them) did not emerge until accentuated by the 1961 crash, even though equivalent risks had been latent for as long as planes had flown the local skies.

In June 1955 the plaintiffs, both of them experienced real estate developers and builders, bought 122.32 acres of forested land fringing the northern boundary of the Willow Grove Naval Air Station at Willow Grove, Pennsylvania. The air station, opened in 1943, became in postwar years, and still is, a flight training center for reservists of the Navy, Marines, and Air Force, as well as the Air National Guard. Until July 1955 only propeller-driven aircraft, mostly single-engine fighter types, were assigned to the station, with the exception of a period starting in 1950 when a few twin-engine jet fighters capable of negotiating the relatively short runways were temporarily in operation. A 4,000-foot extension to the north end of the main northwest-southeast runway was built and became operational in July 1955 to permit jet fighter operations, and immediately a number of single-engine F-9 and T-33 jet fighter planes were transferred to the station and an active program was launched to convert reserve pilots of conventional planes into jet pilots. Then and later most of the flight activity at the base involved jet fighter aircraft, primarily during the warmer months on weekends (hence the soubriquet, "weekend warriors") and during annual fortnightly training periods, all of them operating from the extended northwest-southeast runway. Because the plaintiffs' property lay entirely within the approach zone at the northern end of the extended runway, all jet flights taking off to the north or landing to the south on that runway (constituting half or more of all flights due to the prevailing breezes) funneled over the plaintiffs' property at above-ground altitudes ranging from 200 feet to 350-500 feet in taking off across the hither and yonder boundaries, respectively, and from 220 to 303 feet on GCA landings (Ground Control Approach, used under nonvisual weather

conditions). These altitudes varied within 50 feet depending on the particular aircraft, type of mission, atmospheric conditions, pilot technique, etc. Visual landings (VFR; 90 percent of total landings) were at higher than GCA altitudes. Propeller-type aircraft using the northwest-southeast runway both before and after its lengthening landed under visual conditions, and took off, at higher altitudes over the plaintiffs' property than their jet counterparts. Commencing in September 1957 the F-9 jets were gradually replaced with F-1's which, because of their superior power and flight characteristics, departed and arrived visually over the property in question at substantially higher levels than other jet aircraft in use there, and produced more noise, but not enough to surcharge the existing easement of flight insofar as the plaintiffs demonstrated. The volume and varieties of flights and aircraft prior to December 1957 (the date six years prior to suit) were not substantially different from those thereafter from the standpoint of increasing the interference with use of plaintiffs' land. At no time prior to at least 1963 were there employed at the station any supersonic jets or ones equipped with afterburners.

The defendant correctly and understandably concedes that these flight activities invaded the plaintiffs' property rights in the "superadjacent airspace", for any residential potential in the land was seriously impaired by the nerve-jangling noise, vibration, and sight of the low-flying planes. Witness graphic proof of this in the written complaint made in January 1957 by the operator of a children's summer day camp to the commandant of the air station. In July and August of each year from 1956 through 1961 the Silver Arrow Day Camp was conducted for young children on a 21.55-acre piece of the plaintiffs' original tract which they had sold in May 1956. The small tract, containing an old mansion and miscellaneous farm structures, abutted the northern boundary of the base, and was directly in line

with the offending northwest-southeast runway. The camp operator's complaint, based upon flights in the summer of 1956, described the location of the camp in direct line with the runway, expressed fear for the safety of the children from planes flying with a "deafening roar" at "extremely low altitudes * * * directly over the camp.", referred to the children as having been "'frightened to tears" from the perilous proximity of the passing planes, and requested measures to reduce the hazard. The camp operated only during weekdays, when the flight activities ebbed sharply from the heightened weekend traffic, so we may surmise how much more distressing the situation would have been on weekends to permanent residents beneath, had there been any. The complaint was investigated by the air station, but no corrective action consistent with discharge of the Navy mission was deemed possible. If early conditions were so objectionable as to evoke such a complaint, knowledge of them must be imputed to the plaintiffs who could then or at any time prior to the lapse of six years in July 1961 or thereabouts have instituted the present action, rather than delaying the filing of this now time-barred suit until December 1963, as they did.

The plaintiffs purchased the property for the purpose of subdividing and building homes for sale. In mid-1955 they approached both the Federal Housing Administration and the local planning commission in order to obtain the benefits of the FHA loan insurance program in the one case, and to receive tentative approval of a preliminary development plan in the other. In explanation of its refusal the FHA remarked the proximity of the property to the overhead air traffic, and cited its 1954 policy which prohibited loan insurance coverage to properties adjacent to airports. This, of course, would not preclude private financing, if available, but FHA coverage is highly desirable in the marketing of new homes. It may be true as the plaintiffs have averred

that they were unaware of the extent and nature of the overflights until 1960, or that they did not know in 1955 that the runway channeling planes over their property had been extended so as to aggravate the problem, but the flight facts were readily apparent to anyone who took the trouble to see or to inquire, and the plaintiffs' professed ignorance of them was their own fault, as was their failure to learn prior to purchasing the property the readily ascertainable facts concerning expansion of the air station's program.

The preliminary development plan which the plaintiffs had presented informally to the local planning commission in 1955 was returned for certain corrections. In 1960 the plaintiffs revived their interest in developing the property and submitted revised development plans to the planning commission, altering them again in early 1961 to meet zoning requirements, only to have them rejected because of the risk entailed in locating a high density residential development in an approach zone of a major runway. The plaintiffs attribute the adverse action of the planning commission to the August 27, 1961 crash of an aircraft into a large store hard by the station, which they urge brought home the hazards of living close to an airport. This, the plaintiffs contend, coupled with seven years of persistent jet flight operations, accrued their cause of action by a process of culmination, for it emphasized and advertised the risk feature with the result of making their property unmarketable for its intended use. This oversimplifies the actuality. The plaintiffs voluntarily elected to postpone reapplying to the planning commission until 1960 for reasons best known to themselves. Had they pursued their initial application in 1955 there is no reason to believe that the planning commission would have ignored the well-known facts of the disadvantageous property location in relation to flight activity, or would have been any more willing to sanction a high density subdivision in 1955 than in 1961. The plaintiffs

overemphasize the effect of the 1961 crash on the commission's action, whereas the reason given by the commission for refusing approval in 1961 would have been equally applicable to 1955, and no doubt as conclusive. The 1961 decision of the commission was not "tacit acknowledgment" that until the crash the public would purchase homes in the development. Since then the plaintiffs have abandoned their plans and the property remains on their hands, useless and unused.

The contention that the cause of action accrued with the crash of August 1961 because it established a risk factor which was theretofore unappreciated is, moreover, vitiated by the record that in the 17 years preceding that incident there had been 17 airplane crashes on or in the vicinity of the same airstation, not to mention four additional crashes in the two following years. With this busy fatality record it is idle for the plaintiffs to single out one of many such accidents as the sudden cause of public recognition that the property in suit was unsuitable for homesites from a risk standpoint alone, independent of other harassing features of living in an approach zone which the plaintiffs have purposely underplayed to avoid the limitation defense. If it could not be judicially noticed that hazards would attend living in a development on the plaintiffs' land bordering the airport, the prevalence of accidents in the area over the years would remove any doubts. Furthermore, whereas the degree of interference with a livable environment at the end of a runway might well vary with the type of aircraft, their altitude, number, noise, and general nuisance, there is no reason to believe that the risk inherent in overhead flights varies or is governed by these criteria. The crash of a tiny pleasure plane into a home might be as disastrous to its occupants and as likely but unpredictable in its occurrence as that of a more sophisticated and deadly military aircraft.

It is not seen how the precedents on which the plaintiffs principally rely aid them. *Jensen v. United States,* 158 Ct. Cl. 333, 305 F. 2d 444 (1962); *United States v. 3276.21 Acres of Land,* 222 F. Supp. 887 (1963); *Bacon v. United States,* 155 Ct. Cl. 441, 295 F. 2d 936 (1961). All three support the now common view that where the nature and degree of the disturbance to private property rights in approach zones below the line of flight is substantially worsened and rendered intolerable by the use of aircraft which, because of their size, power, noise, altitude and flight characteristics, or because of structural changes in the airport layout, impose a greater degree of interference in the enjoyment of property over which they pass en route to or from their operating runways than the conditions which previously inhered, a significant depreciation in the market value of the property as a direct result of the overflights is not only prerequisite to recovery of just compensation but also marks the date of taking from which applicable statutes of limitation commence to run and valuations for damage purposes are to be measured. This may or may not coincide with the advent of the equipment creating the surcharge, according to the time of total impact in numbers and types of aircraft, frequency and altitude of flights, noise, danger, and other incidents which impair the normal enjoyment of property and hence its market value. Risk of crashes is but one of many elements to consider and, standing alone, has not yet been held to trigger a taking of property in the Constitutional sense or to amount to more than a trespass. It is true that in the *Bacon* case, *supra,* a fortuitous crash near the home of one plaintiff happened to coincide chronologically with the culminating effect of a new breed of jet aircraft (the F-84f) which, because of their number, flight frequency, and significantly different operating characteristics were more disruptive to dwellers in the approach zone below their repeated passage than the types of aircraft

which they displaced or augmented, and thus effected not only a taking but also caused the withdrawal of previously available FHA, VA, and conventional financing forms so indispensable to marketability.

We cannot say with any confidence at what precise point after the first arrival of jets at Willow Grove in July 1955 they reached the level of substantial interference, but it is clear that it was reached at least by the summer of 1956 when conditions prompted the convincing complaint by the proprietor of the Silver Arrow Day Camp, referred to above. There is minor conflict in the testimony on the score of low and frequent flights, but it is inconceivable that those witnesses of the plaintiffs who were on the property and saw few or no aircraft skirting the treetops during periods of prime activity could have been so oblivious of conditions which affected the day camp so profoundly. The belying flight statistics, sketchy as they are in breakdown, raise the question of the credibility of those who were there and profess to have seen or heard nothing untoward.

The differences between the present case and those cited by the plaintiffs are obvious. A long record of aircraft accidents antedating the 1961 crash by 17 years established, unlike the *Bacon* case, that a serious potential risk not only existed but had materialized and was known throughout the Willow Grove area, so that the 1961 crash, no matter how well-publicized it may have been, was only anticlimactic to the clear warnings which past events had supplied so abundantly. Further, the withdrawal of FHA and VA loan guarantee protection in the *Bacon* case was contemporaneous with the crash and the actionable peak of the overflight burden, whereas in the present case the FHA had precluded plaintiffs from its program in 1955, the overflights became onerous no later than the summer of 1956, and the suit was filed seven years later. The refusal of the planning commission to approve the plaintiffs' development

plan in 1961, discussed earlier, may evidence the cause of plaintiffs' loss, but does not mark its inception. It could not be argued that because the planning commission rejected the plaintiffs' proposal in 1961 that the plaintiffs were forgivably blind to the reasons in existence for the preceding six years, or could not have taken appropriate action more seasonably. The planning commission did not withhold its rejection waiting for the overflights to become intolerable or for a plane to crash; it was merely not called upon to pass judgment until the plaintiffs applied. A clear line must be drawn between cause and effect.

The record contains voluminous data on valuation for the determination of damages, but it is not reflected herein because the plaintiffs have failed to establish the existence of liability and the petition should be dismissed.

IN THE UNITED STATES COURT OF CLAIMS.

* * * * * * * * *

346-63 COE A. BOARDMAN, ET AL.

v.

THE UNITED STATES.

* * * * * * * * *

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, Judges, except that REED, Justice (Ret.), sitting by designation, participated in App, 6-65 in place of DAVIS, Judge.

ORDER.

These cases come before the court on motions for reconsideration, order vacating dismissal, rehearing, relief from order, and for further relief under Rules 68 and 69 of the Rules of this court, and on consideration thereof,

IT IS ORDERED this 13th day of October 1967, that said motions be and the same are denied as follows:

* * * * * * * * *

346-63 Coe A. Boardman, et al. Plaintiffs' motion for rehearing.

* * * * * * * * *

BY THE COURT,

/s/ WILSON COWEN,
Chief Judge.